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No. 83-967

In the Supreme Court of the United States

OCTOBER TERM, 1983

PEOPLE OF THE TERRITORY OF GUAM, PETITIONER

v.

CONCEPCION OKADA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANN T. WALLACE
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTION PRESENTED

Whether the court of appeals has jurisdiction over an appeal from a decision by the appellate division of the District Court of Guam reversing a criminal conviction.

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INTEREST OF THE UNITED STATES

On March 19, 1984, the Court invited the views of the Solicitor General concerning this case.

STATEMENT

1. Respondent was indicted in early March 1978 for unlawful delivery of heroin, in violation of Guam territorial law. Trial was set for the Superior Court of Guam in August 1978. After the Territory filed a document of supplemental discovery that stated that some tape recordings of respondent's conversations during the drug transaction had been lost, the trial court prohibited the admission of any tapes in the

Territory's case-in-chief. Ultimately, however, some tapes were admitted in evidence to rebut respondent's testimony that she had not been involved in any heroin transaction. At that point, respondent requested a one week continuance to study the tapes, which was denied. The jury found respondent guilty as charged. Respondent then moved for a new trial based upon the Territory's failure to allow discovery of the tapes. The trial court denied the motion, and it sentenced respondent to ten years' imprisonment and a $10,000 fine.

Respondent appealed to the appellate division of the District Court of Guam. See 48 U.S.C. (Supp. V) 1424. A three judge panel reversed the conviction and dismissed the indictment with prejudice (Pet. App. 1a-9a). The court concluded that dismissal was necessitated by the government's negligent failure to preserve "possibly" exculpatory evidence (*id.* at 5a).

2. The Territory appealed this decision to the United States Court of Appeals for the Ninth Circuit invoking both 28 U.S.C. (1976 ed.) 1291 [1] and 18 U.S.C. 3731 [2] as a basis for appellate juris-

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[1] 28 U.S.C. (1976 ed.) 1291 provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

The statute was amended in 1982 to account for the creation of the United States Court of Appeals for the Federal Circuit. That amendment is not pertinent here.

[2] 18 U.S.C. 3731 provides in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or in-

diction. On April 9, 1981, the court of appeals issued an opinion dismissing the appeal for lack of jurisdiction (Pet. App. 10a-17a; 642 F.2d 287). The court concluded that the Territory could not appeal from an adverse decision in a criminal case absent an express statutory authorization from Congress, which did not exist here. Relying on *United States* v. *Sanges*, 144 U.S. 310 (1892), and subsequent cases, the court held that 28 U.S.C. 1291, standing alone, does not authorize a prosecution appeal in a territorial criminal case (Pet. App. 11a-13a). The court further concluded that Section 130.20(a) of the Guam Criminal Procedure Code (1977),[3] standing alone, could

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formation as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

[3] Section 130.20(a) provides in pertinent part:

An appeal may be taken by the government from any of the following:

(1) An order granting a new trial.

(2) An order arresting judgment.

(3) An order made after judgment affecting the substantial rights of the government.

(4) An order modifying the verdict on finding [*sic*] by reducing the degree of the offense or the punishment imposed.

(5) An order or judgment dismissing or otherwise terminating the action before the defendant has been placed in jeopardy or where the defendant has waived jeopardy.

(6) An order granting a motion to suppress evidence. This appeal may be taken prior to trial if the appeal is timely filed pursuant to § 130.40 of the Criminal Procedure Code and before the trial has commenced. Upon the timely filing of an appeal pursuant to this Subsection, the Superior Court shall

not authorize the appeal because the statute authorizes appeals only to, not from, the District Court of Guam (Pet. App. 14a). The court also stated that a Guam statute could not authorize an appeal to a federal court because "Congress has not * * * delegated to the Guam Legislature any power to determine the jurisdiction of the Ninth Circuit Court of Appeals" (*id.* at 15a). In addition, quoting *Arizona* v. *Manypenny*, 608 F.2d 1197, 1199 (9th Cir. 1979), the court observed that Guam's appeal could not be authorized by 18 U.S.C. 3731 "since 'it is manifest that § 3731 is limited by its own terms to appeals by the United States as a prosecuting entity'" (Pet. App. 20a).

Following this Court's reversal in *Arizona* v. *Manypenny*, 451 U.S. 232 (1981), the court of appeals issued a new opinion in which it again dismissed petitioner's appeal for want of jurisdiction (Pet. App. 23a-43a; 694 F.2d 565). The court found that *Manypenny* was distinguishable, explaining (Pet. App. 29a-30a):

> The state statute involved in *Manypenny* authorized an appeal from a trial court to an appellate court. It is undisputed that Guam law authorizes an appeal from the Guam trial courts to an intermediate appellate court, the Appellate Division of the District Court of Guam. See Guam Crim. Proc. Code § 130.20(a) (1977). The present case raises a different issue, however[;] the question we must answer is whether any law authorizes a second appeal, from the District Court to this Court.

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stay all proceedings until the Appellate Court has acted pursuant to § 130.60 of the Criminal Procedure Code.

The court of appeals concluded that Guam lacked the power to authorize such an appeal from the district court. It explained that under 48 U.S.C. (Supp. V) 1424(a) the Guam legislature is authorized to prescribe "[t]he jurisdiction of and the procedure in the courts of Guam other than the District Court of Guam" (Pet. App. 32a). Finding that the authority to take an appeal is procedural, the court concluded that this statute barred the Guam legislature from legislating on the matter of appeals from the district court to the court of appeals (*id.* at 34a-35a). Accordingly, the court determined that the Guam statute authorizing government appeals in criminal cases could not authorize the appeal here. With respect to the contention that appeal lay under 18 U.S.C. 3731, the court noted that in *Manypenny* this Court had declined to decide whether Section 3731 authorizes federal appeals by prosecuting entities other than the United States (Pet. App. 38a n.3). The court of appeals stated that "[i]n the absence of Supreme Court instructions to the contrary, we adhere to our former view and hold that section 3731 does not authorize appeals by prosecuting entities such as states and territorial governments" (*id.* at 38a).

The Territory filed a petition for rehearing, calling attention to the decision in *Government of the Virgin Islands* v. *Christensen*, 673 F.2d 713 (3d Cir. 1982), where the court of appeals held that 18 U.S.C. 3731 authorized appeals in criminal cases by the government of the Virgin Islands. The court of appeals denied the petition for rehearing, but amended its opinion by adding a footnote (Pet. App. 44a-48a; 715 F.2d 1347). The court criticized as "unwarranted" the Third Circuit's "resort to section 3731" as authority for an appeal by a territorial government (Pet. App. 47a).

DISCUSSION

The decision below creates a serious and unjustifiable anomaly in the administration of the federal courts. It prohibits the Territory of Guam from taking an appeal to the court of appeals from a lower court's legal ruling reversing a criminal conviction, even though: (1) Congress plainly has conferred jurisdiction on the court of appeals to hear such an appeal; (2) the United States unquestionably could take such an appeal if it were the prosecutor; (3) other territorial governments (such as the Virgin Islands) can take such an appeal; and (4) Guam law unequivocally authorizes its prosecutor to take such an appeal. Moreover, this result, which incidentally makes a non-Article III court the final arbiter in this case, is contrary to a recent decision of this Court. In fact, two different federal statutes, 28 U.S.C. 1291 and 18 U.S.C. 3731, permit Guam to take the appeal dismissed here. This decision's serious denial of Guam's right to conduct its own affairs and its singling out of Guam for unique treatment among sovereign prosecuting entities warrants review by this Court.

1. There is no doubt that the language of 28 U.S.C. 1291 authorizes the appeal taken in this case. It provides: "The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States, [and] the United States * * * District Court for the District of Guam * * *." The court of appeals held, however, that this language does not apply to appeals taken by Guam as prosecutor in a criminal case (Pet. App. 24a-26a). At least in the context presented here, this holding is completely inconsistent with *Arizona* v. *Manypenny*, 451 U.S. 232 (1981).

In *Manypenny*, the State had brought a criminal prosecution in state court against a federal Border Patrol Agent. The defendant removed the case to federal district court pursuant to 28 U.S.C. 1442(a)(1). After a jury returned a verdict of guilty, the court entered a judgment of acquittal on the ground of the defendant's immunity as a federal officer acting in the course of his duties. Despite the fact that 18 U.S.C. 3731 would have authorized an appeal from this ruling if the United States were the prosecuting entity and that Arizona law would have provided for appeal had the case not been removed from the Arizona courts, the Ninth Circuit dismissed the state's appeal for lack of jurisdiction.

This Court reversed and reinstated the State's appeal. The Court flatly rejected the contention that *United States* v. *Sanges*, 144 U.S. 310 (1892), foreclosed all criminal appeals in federal court by a governmental entity unless specifically authorized by a federal statute other than 28 U.S.C. 1291. The Court noted that the text of Section 1291 plainly conferred jurisdiction on the court of appeals, explaining (451 U.S. at 244-245 (footnote omitted)):

> Under 28 U.S.C. § 1291, any litigant armed with a final judgment from a lower federal court is entitled to take an appeal. By its terms, the statute addresses neither the identity of particular parties nor the nature of the prior legal proceedings.

The Court went on to explain that the traditional presumption against criminal appeals by the United States discussed in *Sanges* had no application to the State's appeal in *Manypenny*. In the words of the Court, "*Sanges* holds simply that the *federal sovereign* may not subject one of its citizens to continued

federal prosecution in its own courts where it has not been expressly permitted to do so under federal law." *Id.* at 247 (emphasis added). Rather, "*Sanges* and its subsequent applications have placed the responsibility for such assertions of authority over citizens in the democratically elected Legislature where it belongs." *Ibid.*

The Court concluded therefore that the historical restraints on "the availability of § 1291 in a criminal context flow from a tradition of requiring that a prosecutorial appeal be affirmatively sanctioned by the same sovereign that sponsors the prosecution." 451 U.S. at 249. "The intention to restrict sovereign power in this area is adequately addressed when the legislature responsible for that power has spoken in express terms." *Ibid.* Accordingly, the Court held that the provision of Arizona law authorizing the appeal in state court, coupled with Section 1291, provided a basis for the appeal to the Ninth Circuit.

This case is on all fours with *Manypenny*. Assuming arguendo that Section 1291 alone does not provide a sufficient basis for the appeal,[4] the explicit provi-

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[4] It is questionable whether the traditional reluctance to find authority in 28 U.S.C. 1291 for governmental appeals in criminal cases retains any validity today. *United States* v. *Sanges* itself involved a case where the trial court had rendered a "final judgment in favor of the defendant." 144 U.S. at 318. As this Court said in *Manypenny*, "*Sanges* holds simply that the federal sovereign may not subject one of its citizens to *continued federal prosecution* * * * where it has not been expressly permitted to do so." 451 U.S. at 247 (emphasis added). Thus, even if *Sanges* were fully applicable today, it is doubtful whether it ought to have any bearing on this case where the judgment in favor of the defendant was rendered by a court of appeals and the government seeks only

sions of Guam law coupled with Section 1291 unquestionably do provide such a basis. Section 130.20(a) of the Guam Criminal Procedure Code clearly au-

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to reinstate the jury's guilty verdict, not to subject the defendant to "continued prosecution."

More important, the underlying rationale of *Sanges* that, because of the common law tradition, appeals by the United States in criminal cases are something unusual or exceptional (*Carroll* v. *United States*, 354 U.S. 394, 400 (1957)) and hence require explicit authorization, is no longer valid. The enactment of the present version of 18 U.S.C. 3731 in 1971 greatly expanded the government's right to appeal in criminal cases and that statute specifically provides that it should be "liberally construed" to effect its purpose of allowing government appeals where not barred by the Double Jeopardy Clause. See especially *United States* v. *Wilson*, 420 U.S. 332, 337-339 (1975); S. Rep. 91-1296, 91st Cong., 2d Sess. 18, 37 (1970). Indeed, in *Carroll* itself, prior to the passage of Section 3731, this Court rejected a broad reading of *Sanges* in suggesting that some orders in criminal cases could be appealed by the government solely on the authority of 28 U.S.C. 1291. See 354 U.S. at 403.

Accordingly, it has been well recognized in the courts of appeals that certain orders in criminal cases may be appealable by the United States under the authority of 28 U.S.C. 1291, so long as the finality requirement is satisfied. See, *e.g.*, *United States* v. *Kajevic*, 711 F.2d 767 (7th Cir. 1983), cert. denied, No. 83-5536 (Jan. 9, 1984) (order reducing sentence under Fed. R. Crim. P. 35); *United States* v. *Prescon Corp.*, 695 F.2d 1236, 1241 (10th Cir. 1982) (illegal sentence); *United States* v. *DeMier*, 671 F.2d 1200, 1204 (8th Cir. 1982) (sentence reduction); *Iuteri* v. *Nardoza*, 662 F.2d 159 (2d Cir. 1981) (order granting bail pending habeas ruling); *United States* v. *DuPris*, 664 F.2d 169, 172-174 & n.5 (8th Cir. 1981) (order denying the government's motion to dismiss under Fed. R. Crim. P. 48(a)); *United States* v. *Caggiano*, 660 F.2d 184, 189-190 (6th Cir. 1981), cert. denied, 454 U.S. 1149 (1982) (order disqualifying the entire United States Attorney's Office from participating in a criminal trial); *United States* v. *United States District Court, Cent. Dist.*

thorizes the prosecutor to take an appeal from an order dismissing the indictment. If the trial court had entered this order, it is undeniable that the Territory could have appealed to the district court. And nothing in Guam law suggests that the prosecutor should not be allowed to appeal when the adverse order is entered on the defendant's appeal. Thus, as in *Manypenny*, the "democratically elected Legisture" (451 U.S. at 247) has expressly authorized its prosecutor to take the appeal in question, and Section 1291 provides jurisdiction over the appeal. See especially 451 U.S. at 250-251 (Stevens, J., concurring).

The court of appeals' efforts to distinguish *Manypenny* are unpersuasive. The court concluded that the Guam statute could not have an effect analogous to that of the Arizona statute in *Manypenny* because, regardless of the intent of the Guam legislators, Guam lacks the power to legislate with respect to "proce-

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Cal., 601 F.2d 379, 380 (9th Cir. 1978) (order failing to impose a mandatory special parole term); *In re Grand Jury Empanelled February 14, 1978*, 597 F.2d 851, 857-858 (3d Cir. 1979) (order quashing grand jury subpoena); *United States* v. *Busic*, 592 F.2d 13, 25-26 (2d Cir. 1978) (order setting early parole eligibility); *In re Special February 1977 Grand Jury*, 581 F.2d 1262, 1263-1264 (7th Cir. 1978) (order denying government's motion to disqualify counsel in grand jury proceeding); *Application of the United States*, 563 F.2d 637, 641 (4th Cir. 1977) (order denying the government's application for electronic surveillance warrant); *In re Grand Jury Proceedings* (*U.S. Steel, Inc.*), 525 F.2d 151, 154-156 (3d Cir. 1975) (order staying grand jury proceedings); *United States* v. *Cowan*, 524 F.2d 504, 505 (5th Cir. 1975), cert. denied, 425 U.S. 971 (1976) (order denying government motion to dismiss and appointing special prosecutor). By the same token, Section 1291 alone would appear to provide a basis for Guam to appeal here where the district court, acting in an appellate capacity, has entered a final judgment in the defendant's behalf reversing a jury's guilty verdict.

dure" in the Ninth Circuit (see 48 U.S.C. (Supp. V) 1424(b)), and the right to take an appeal must be classed as procedural. Pet. App. 30a-35a. But this conclusion completely misses the point. It is true, of course, that in granting a significant measure of self-government to Guam, Congress retained the power to prescribe judicial procedure in the Ninth Circuit and in the District Court of Guam. But that was equally true in *Manypenny*. Obviously, the Arizona legislature has no authority to prescribe "procedure" in the Ninth Circuit or in the United States District Court for the District of Arizona. The point is that the authority to take a criminal appeal is not procedural in this sense; it is a policy decision left to the appropriate sovereign. Congress has left this aspect of self-government up to the Guam legislature, which, like Arizona, has made a policy decision that its prosecutor should have the authority to take an appeal in the circumstances presented here. This is not to suggest that the Guam legislature has the power to confer *jurisdiction* over this appeal on the Ninth Circuit. This is the province of Congress, but Congress has already provided the court of appeals with jurisdiction to hear such an appeal in 28 U.S.C. 1291. See especially *Manypenny*, 451 U.S. at 250-251 (Stevens, J., concurring).[5]

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[5] The court of appeals also noted (Pet. App. 29a-30a) that *Manypenny* involved an appeal from a trial court to an appellate court, whereas this case involves a "second appeal" from the district court to the court of appeals. First, this observation is somewhat misleading since the appeal in this case is the Territory's first appeal, the defendant having appealed initially. More important, this observation seems completely irrelevant. There is no reason why the jurisdiction of the court of appeals or Guam's power to authorize its prosecutor to take an appeal ought to depend on whether the district

2. Even if Section 1291 and Guam law were construed not to authorize the appeal taken in this case, the appeal should be permitted under 18 U.S.C. 3731, which undisputedly would authorize the appeal if this were a federal prosecution. The legislative history of the Criminal Appeals Act of 1907, ch. 2564, 34 Stat. 1246, the predecessor to the present 18 U.S.C. 3731, is examined in *United States* v. *Sisson*, 399 U.S. 267, 293-296 (1970). Efforts to pass such legislation began in 1892, when this Court held in *Sanges* that because criminal appeals by the prosecutor historically had been expressly authorized by the sovereign, the Court would not read 28 U.S.C. 1291's predecessor to authorize an appeal by the United States of a criminal case. The language of the Act does specifically refer to the "United States," but there is nothing in the history of the 1907 Act or the 1971 enactment of Section 3731 that suggests that Congress believed that a distinction should be drawn between federal and territorial prosecutions. The purpose of the Act was to control the unreviewable power of lower court judges to end a prosecution, a consideration that should apply equally to territorial or federal

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court rendered its decision as a trial court or an appellate court. Indeed, the presumption in favor of appellate jurisdiction ought to be stronger in this context since there is no conceivable double jeopardy problem. Significantly, the courts of appeals have explicitly held, with respect to both Guam and the Virgin Islands, that 28 U.S.C. 1291 confers jurisdiction over appeals from the territorial federal district courts regardless of whether they are acting as trial courts or in an appellate capacity. See *Guam* v. *Kingsbury*, 649 F.2d 740, 741-742 (9th Cir.), cert. denied, 454 U.S. 895 (1981); *Corn* v. *Guam Coral Co.*, 318 F.2d 622, 623-628 (9th Cir. 1963); *Southerland* v. *St. Croix Taxicab Ass'n*, 315 F.2d 364 (3d Cir. 1963).

prosecutions. See 41 Cong. Rec. 2192 (1907). Congress gave no specific consideration to the right of appeal of a territory in a federal court, although the frequent references in the legislative history to "Government" appeals suggest that Congress would have treated territories just like the United States, had it understood that territorial appeals would be barred unless authorized in Section 3731. See, *e.g.*, S. Rep. 91-1296, 91st Cong., 2d Sess. 1 (1970).[6]

It seems plain that Section 3731, passed in response to the *Sanges* decision, spoke in terms of the "United States" simply because it was appeals by the "United States" that *Sanges* had held not to be authorized by 28 U.S.C. 1291 in the absence of a specific enactment by Congress. As we have suggested above (see note 4, *supra*), the decision in *Sanges* should not be considered controlling today and, in any event, should not be construed to restrict appeals by territories. If the meaning of "United States" in *Sanges* is stretched to include territories, however, then "United States" in Section 3731 should be given the same construction, and Section 3731 should be held to authorize the appeal here.

In *Manypenny*, this Court found it unnecessary to decide whether 18 U.S.C. 3731 authorizes prosecuting entities other than the United States to appeal from adverse rulings in criminal cases in federal court. See 451 U.S. at 243-244 n.18, 250 n.27. We note, however, that the concerns identified by the Court in this connection (see *id.* at 243 n.18) do not exist in the case of a territory as they do when the state is the prosecuting entity. Specifically, the Court's concern that extension of the right of appeal conferred

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[6] Section 3731 specifically provides that "[t]he provisions of this section shall be liberally construed to effectuate its purpose."

by Section 3731 to a state that does not authorize comparable rights under state law might inhibit the exercise of the removal right, contrary to federal policy, obviously is not a factor when the prosecuting entity is a territory.

By the same token, application of Section 3731 here would not be an intrusion into the sovereignty of the prosecuting entity—its "interest in enforcing its own criminal laws" (451 U.S. at 244 n.18)—in the way that it would be in the case of a state. A territory, unlike a state, "does not have independent sovereignty but derives such powers as its government possesses directly from congressional grant under Article IV, section 3 of the federal Constitution." *Government of the Virgin Islands* v. *Dowling*, 633 F.2d 660, 669 (3d Cir.), cert. denied, 449 U.S. 960 (1980). As this Court noted in *United States* v. *Wheeler*, 435 U.S. 313, 321-322 (1978) (citations omitted), "a territorial government is entirely the creation of Congress. * * * When a territorial government enacts and enforces criminal laws to govern its inhabitants, it is not acting as an independent political community like a State, but as 'an agency of the federal government.'" Thus, Congress clearly has the power to prescribe the appeal authority of the territorial prosecutor; whether it does so or leaves the matter to the territorial government is a matter of congressional choice. That plainly is not true in the case of a state. Given these differences between a state and a territory, it would appear that the Court's observation in *Manypenny* that "[b]y enacting the current version of 18 U.S.C. § 3731 * * * Congress manifested an intent to remove all statutory barriers to a criminal appeal" taken by the prosecution (451 U.S. at 243 n.18) indicates that Section 3731 should be held to authorize the appeal here.

As the court of appeals itself acknowledged on rehearing (Pet. App. 44a-48a), its decision that Section 3731 cannot authorize an appeal by a territorial government directly conflicts with the Third Circuit's decision in *Government of the Virgin Islands* v. *Christensen*, 673 F.2d 713, 716-717 (1982). Relying on *Wheeler*, the *Christensen* court explained that the territorial Government is ordinarily thought of as a prosecutorial arm of the federal government, and therefore it was reasonable to infer that Congress intended that the territorial governments be included within the term "United States" in Section 3731. And, as noted above, this conclusion seems inescapable if Section 1291 is held to be inapplicable on the ground that the *Sanges* limitation on appeals by the "United States" must be treated as applying to territorial governments.[7]

3. In sum, the court of appeals' decision should not be permitted to stand. Every relevant factor indicates that appeal should lie here. Section 1291 plainly confers jurisdiction on the courts of appeals. Section 3731 plainly represents a congressional judgment that such an appeal is an appropriate exercise of prosecutorial power and establishes that appeal would

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[7] For this reason, the Ninth Circuit's reliance (Pet. App. 47a-48a) on Judge Sloviter's special concurrence in *Christensen* is completely misplaced. Judge Sloviter disagreed with the majority's reliance on Section 3731, reasoning that, under *Manypenny*, the question turned on whether Virgin Islands law expressly authorized the prosecutor to take an appeal. Because it did not, Judge Sloviter concluded that the court of appeals lacked jurisdiction. See 673 F.2d at 720-721. It is quite clear from her opinion that she would have found jurisdiction in the present case, however, based on the explicit appeal authority contained in Section 130.20(a) of the Guam Criminal Procedure Code.

lie if the United States were the prosecutor. Guam law plainly reflects a judgment by the local government that its own prosecutor should have authority to pursue such an appeal. The court of appeals' conclusion, against this background, that it lacks jurisdiction over this case is wholly unfounded. It ascribes to Congress an intent both to preserve for itself from Guam's otherwise broad power of self-government the authority to determine one particular aspect of its prosecutorial appeal rights [8] and to withhold from Guam the right to appeal in those situations despite the fact that the United States could appeal under 18 U.S.C. 3731. There is no reason to believe that Congress has legislated in such a perverse manner.

The unjustness of the decision below is exacerbated by the way it denigrates the sovereignty of Guam in comparison to other territories. As noted above, the Virgin Islands prosecutor would be permitted to take the appeal dismissed here. See *Government of the Virgin Islands* v. *Greene*, 708 F.2d 113, 114 n.1 (3d Cir. 1983); *Government of the Virgin Islands* v. *Christensen*, *supra*. Moreover, the Ninth Circuit itself has held that the prosecutor of the Northern Mariana Islands has the right to appeal to the Ninth Circuit without special authorization from Congress. *Northern Mariana Islands* v. *Atalig*, 723 F.2d 682, 686-687 (9th Cir. 1984), petition for cert. pending, No. 83-6424.[9] Only Guam, apparently, requires spe-

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[8] The court of appeals, of course, does not dispute that Guam has the power to authorize a prosecutorial appeal from the trial court to the district court.

[9] The Ninth Circuit attempted to distinguish this case in *Atalig* by pointing to the inherent right of the Northern Mariana Islands to govern itself that is embodied in the rele-

cial legislation from Congress in order to have an avenue of review available when the district court reverses a conviction.

Finally, the ruling of the court of appeals conflicts with a distinct policy enunciated by this Court against foreclosing appellate review by Article III tribunals of territorial court decisions. The result of the decision below is that the legal ruling by the district court here—a court established under Article IV of the Constitution whose judges lack constitutional guarantees of life tenure and salary protection—is unreviewable. Yet in *Guam* v. *Olsen*, 431 U.S. 195 (1977), this Court struck down a major restructuring of the Guam court system precisely because it would have established an Article IV court as the general court of last resort. This Court stated (431 U.S. at 201): "we should be reluctant without a clear signal from Congress to conclude that it intended to allow the Guam Legislature to foreclose appellate review by Art. III courts, including this Court, of decisions of territorial courts in cases that may turn on questions of federal law." Similarly, there is no reason to suppose here that Congress intended to foreclose review by an Article III court.

In short, the decision below is manifestly erroneous. The appeal dismissed in this case should be held to be

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vant Trusteeship Agreement and Covenant. 723 F.2d at 687. While that distinction might be significant if the question were Congress's power to prescribe territorial appeal authority in a federal statute, it is surely irrelevant in this context, where, for both the Northern Mariana Islands and Guam, Congress has left the question of the appellate authority of the prosecutor to the judgment of the territorial legislature.

authorized under either 28 U.S.C. 1291 or 18 U.S.C. 3731.[10]

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[10] There may be cases, like *Christensen*, in which 18 U.S.C. 3731 would authorize an appeal not specifically authorized by territorial law. By the same token, there may be cases where territorial law authorizes an appeal that is not specifically authorized by 18 U.S.C. 3731. Such cases would require resolution of the question whether appeal by a territory lies under 18 U.S.C. 3731 or only under 28 U.S.C. 1291 and would present difficult problems regarding the scope of these two provisions.

In the instant case, however, it is clear that the United States could have appealed the dismissal of an indictment had this been a federal prosecution and that the Guam courts would have had jurisdiction to entertain the territory's appeal had the case been dismissed at the trial level. Since the existence and scope of the appellate jurisdiction is not affected by the question whether the appeal lies under Section 1291 or Section 3731, there is no occasion in this case to address the questions outlined above, which could be dispositive only in other, hypothetical cases not before the Court. That the Territory of Guam had a right to appeal in this case seems to us clear, and the court of appeals should accordingly have entertained its appeal on the merits.

CONCLUSION

The specific issue presented in this case is one that applies only to litigation in the Territory of Guam, and therefore plenary review may not be appropriate. However, the decision below is clearly in error and creates a serious anomaly in the treatment of the different territories. Accordingly, it is our view that the petition for a writ of certiorari should be granted and the judgment of the court of appeals reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANN T. WALLACE
Attorney

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